

Supreme Court, U.S.

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NO. 89-306

IN THE
Supreme Court of the United States

October Term, 1989

MALCOLM T. RILEY, III,

Petitioner,

v.

UNITED PARCEL SERVICE,

Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit.

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI ON
BEHALF OF RESPONDENT
UNITED PARCEL SERVICE**

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QUESTIONS PRESENTED.

1. Did the District Court properly apply the Title VII evidentiary standards to the facts and properly conclude United Parcel Service's reasons for discharging Riley were not pretextual?

2. Did the District Court properly conclude that UPS discharged Riley solely because of his abysmal work record, and there was no evidence of disparate treatment based on race, and race was not a factor in Riley's discharge?

3. Did the Third Circuit Court of Appeals properly affirm that the District Court, after a full trial correctly entered Judgment in favor of United Parcel Service?

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STATEMENT.

A. Introduction: Reasons for Denying the Petition.

Petitioner, Malcolm T. Riley, is nothing, if he is not persistent. The Delaware Human Relations Commission, the federal Equal Employment Opportunity Commission, the United States District Court for the District of Delaware, and the United States Court of Appeals for the Third Circuit have each held that Malcolm Riley's discharge from employment by United Parcel Service ("UPS") was proper, and that he was not discriminated against on the basis of race, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.* There are no novel legal issues presented by this routine, single plaintiff discharge case, and Mr. Riley has simply failed, repeatedly, to present any factual evidence of disparate treatment by UPS.

Mr. Riley has had his claims of racial discrimination investigated by both state and federal equal employment opportunity administrative agencies, and each concluded there was No Probable Cause to credit his allegations. After a full trial, in which Riley was represented by counsel, the District Court concluded Plaintiff had not established that UPS's reasons for his discharge were pretextual and there was no evidence of disparate treatment. The evidence presented at trial clearly demonstrated that UPS discharged Riley solely on the basis of his abysmal work record.

Mr. Riley next appealed, pro se, to the Third Circuit Court of Appeals where the panel for the Court unanimously affirmed the judgment for defendant, without opinion. Mr. Riley's subsequent pro se petition for a rehearing en banc, was also denied by the Third Circuit Court of Appeals.

Now, the pro se Petitioner, once again seeks review of these multiple adverse holdings, but fails to raise any novel factual or legal issues to warrant this Court's review. The Petition should be denied.

B. Procedural History of the Litigation.

Petitioner Riley was employed by United Parcel Service from September 1980 until April 16, 1982. Following his discharge for repeated failure to follow instructions, company methods and procedures, and overall poor work record, he grieved his discharge pursuant to his collective bargaining rights, as a member of a bargaining unit represented by the International Brotherhood of Teamsters ("I.B.T.") Local 326. A grievance hearing was held before the appropriate joint union-employer grievance committee, which upheld Riley's discharge. Thereafter, Riley filed charges of racial discrimination with the Equal Employment Opportunity Commission and the Delaware Human Relations Commission. Both the state and federal agencies investigated Riley's charges and found them meritless; each agency issued a Determination of No Probable Cause to credit Riley's allegations. (J.A. 111; 212-213).¹

Mr. Riley next obtained counsel and filed suit in the District Court of Delaware, contending his discharge was on the basis of race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.*, and 42 U.S.C. § 1981. A three-day bench trial was conducted before District Judge Joseph J. Farnan, Jr. from September 21, 1987 through September 23, 1987. Following the trial, counsel for both parties submitted proposed findings of fact, conclusions of law, and supporting briefs. Upon reviewing the parties' submissions and evidence produced at trial, the District Court issued a Memorandum Opinion setting forth the Court's Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, on June

1. The designation of "J.A." refers to the Joint Appendix in the Court of Appeals. "Tr" refers to the trial transcript. "Dep." refers to portions of witness depositions which were read into the record at trial.

30, 1988. On that same date, the Court issued its Order entering Judgment in favor of the defendant, United Parcel Service.

Thereafter, Petitioner Riley filed an appeal, pro se, with the Third Circuit Court of Appeals, on November 2, 1988. The panel of Judges Stapleton, Greenberg and Scirica unanimously affirmed the Judgment of the District Court without opinion, on April 1, 1989. Mr. Riley then filed a Petition for Rehearing En Banc, which was denied May 3, 1989. He has continued to pursue his case by filing the instant Petition for Writ of Certiorari with this Court.

C. The Facts.

1. Riley's Abysmal Work History.

Riley's pro se Petition obscures the evidentiary facts presented to the District Court at trial, and reviewed by the Third Circuit panel, and presents a rambling narrative containing numerous references to material not in evidence. Based on the testimony and documents which actually *were* introduced into evidence, the Court concluded:

"The evidence presented at trial clearly demonstrated that UPS discharged Riley solely on the basis of his abysmal work record and that the plaintiff's race was never a cause or factor in the defendant's decision to terminate Riley. The Court concludes that the evidence at trial clearly demonstrated that it was Riley's conduct and not his race that led to his many warnings and eventual discharge." (J.A. 10)

The facts which led the Court to these proper and inescapable conclusions were that Mr. Riley amassed an atrocious work performance record in a relatively brief period of time, that he was given numerous warnings and chances to improve his performance but failed to do so, and that there

was no evidence he was treated differently from other employees because of his race.

Malcolm T. Riley, III was employed by UPS from September 1980 until April 16, 1982 (J.A. 1240; Tr. 3A; 32A) at its Wilmington, Delaware facilities. He was initially employed as a parcel unloader and sorter during the pre-Christmas busy season from September through December 1980; thereafter, he worked as an on-call employee from January through March 1981 and in April 1981 became a regular full-time employee. (J.A. 124; 40A). Riley was a member of a bargaining unit represented by the International Brotherhood of Teamsters ("I.B.T."), Local 326. (Tr. B-19-20). Collective bargaining agreements and the past practice applicable to the interpretation of those agreements, provided that UPS administer a system of progressive discipline which could include verbal counsellings, verbal warnings, write-ups placed in an employee's file, center level hearings, official warning letters, suspensions, final warnings, and discharge. (J.A. 183; Mason Dep. p. 59; Tr. 156A).

There was undisputed testimony from UPS managers that UPS reviews and considers an employee's entire work record in determining appropriate discipline and discharge. (J.A. 219-220; 250; 256; 294-301; Tr. 11A-12A; 31A; B25-26; F-79; B-91; C32-44). When this progressive policy was applied to Mr. Riley, his cumulative work record was so unsatisfactory he was discharged.

The uncontradicted testimony of numerous UPS managers demonstrated that during Riley's brief employment, he was repeatedly counselled informally by his immediate supervisors for the need to improve his work performance. (Tr. D 100-110 Mason Dep. 13; Vones Dep. 11). He was written up for job related problems, and spoken to concerning the need to improve. Riley's job performance was found unacceptable in various respects by eight different supervisors acting inde-

pendently, each of whom issued some form of progressive discipline to Riley in an effort to correct his work deficiencies.

In total, Malcolm Riley received three separate Official Warning Letters for unacceptable attendance and for failure to follow instructions; two suspensions for unacceptable attendance; and one suspension for throwing a package which was changed to a Final Warning. In addition to the Warning Letters, center meetings, hearings, and suspensions, Mr. Riley was written-up for forty-eight separate repeated infractions of UPS rules and procedures. These write-ups were issued by eight different supervisors, who testified credibly concerning Riley's misconduct for lateness, absenteeism, no-shows, failing to call in and report his absences, slow package sorting, using improper sorting procedures, damaging packages, smoking in unauthorized areas, missorting packages, and throwing packages.

On February 25, 1982, approximately one month prior to his discharge, Riley was given a "Final Warning", (J.A. 183, Ex. D-2; Tr. 156A) for throwing packages. Riley had been observed by two separate supervisors hurling packages like frisbees, (J.A. 222-224; Tr. B-30). The final warning was based upon "a complete review of your [Riley's] work record" and specifically cited his (1) continual failure to follow instructions, company methods and procedures; (2) unacceptable, insubordinate attitude toward supervisors; and (3) prior numerous center level hearings, three Official Warning Notices, and two prior suspensions.

Less than a month and a half after Riley was issued the final warning, he again violated UPS work rules by reporting to work late, not reporting to work and not calling in, and missorting an unacceptable number of packages. His complete record was reviewed and he was discharged effective April 14, 1982 for his continual failure to follow instructions,

company methods and procedures, and overall work record. (Ex. D-1; J.A. 183-185; Tr. 156A-161A).

In stark contrast to this evidence of Riley's repeated work rule violations and cumulative poor performance, Riley failed to produce any credible evidence of white employees at UPS with similar unsatisfactory work histories. While he attempted to present portions of the personnel records of two employees who had been discharged for time card violations, there was no evidence concerning these employees' overall work record, seniority, or infractions, and therefore, no facts in the record from which the District Court could draw any factual inferences between the disciplinary history of Riley and other co-workers: "... the court concludes on the record before it that the work records of Krug and Parks were not comparable to the plaintiff's work record." (J.A. 10; See Court's Conclusion of Law No. 4).

A third former UPS employee, Mark Caine, was the only witness who testified on behalf of plaintiff, but there was ample factual evidence that Riley's work record was far worse than Caine's: Riley had almost twice as many rules infractions as Caine during the same time frame. (J.A. 215; Tr. B-17-18).

Riley presented no other facts concerning the comparative treatment of other employees at UPS. In contrast to plaintiff's lack of evidence of disparate treatment, a UPS Division Manager with 23 years management experience at UPS credibly testified that his job duties required him to review numerous personnel files, and that he had never seen a file comparable to Mr. Riley's of a white employee who was still employed by UPS. (J.A. 186; Tr. 161A).

Not only was there no evidence of any employees with abysmal records like Riley's, but there was evidence that the discipline itself was applied fairly to all employees. Each of UPS's supervisors and former supervisors who testified at the trial confirmed that he or she administered company rules evenhandedly, regardless of race. (Tr. 158A-162A; B-66;

B-102; B-154; Donahue Dep. pp. 9-10; Vones Dep. p. 34-35; Wink Dep. pp. 21-23; Mason Dep. pp. 16-17). Even plaintiff's own witness, Mark Caine, testified that an employee's race had nothing to do with the treatment received from UPS supervisors. (J.A. 172-174; 136A).

Moreover, the plaintiff's own conduct belied his charge of disparate treatment based on race. Never at any time during his employment at UPS did Riley claim he was being mistreated, disciplined or discharged because of his race. UPS presented evidence that Blacks have risen to supervisory and managerial positions within UPS (Tr. B-57), that UPS has capable full time human resources, personnel, and affirmative action staffs, and that a Black held a position as Assistant Steward in the facility where Riley worked. This union official was present representing Riley at many of his disciplines. (Tr. B-29). If Riley truly believed he was being harassed or treated differently because of his race he could have raised this claim at any time during his employment to any of these persons. Yet he did not do so. Only after his discharge was sustained by the joint union-employer grievance panel, did Riley for the *first* time, claim racial discrimination to the EEOC and the Delaware Human Relations Commission. And these two enforcement agencies each investigated this frivolous race claim and issued No Probable Cause Determinations.

ARGUMENT.

The petition for a writ of certiorari does not present any issue warranting review by this Court.

I.

The Court of Appeals Affirmed, Without Opinion, the District Court's Proper Application of Title VII Evidentiary Standards and Concluded Riley Failed to Establish UPS's Reasons for Discharge Were Pretextual.

The law has been settled for more than a decade, now,

that in a single plaintiff disparate treatment case, alleging employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 e-5(e), the plaintiff must prove by a preponderance of the evidence that his race was the determinative factor in the decision to discharge him. The United States Supreme Court's landmark evidentiary decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) established the evidentiary "game plan" for demonstrating how discrimination must be proven by the evidence: first, the grieved employee must make out a *prima facie* case of discrimination. In discharge cases, this may be done by showing plaintiff was a member of a racial minority; was minimally qualified for the position; was discharged; and other non-minorities were not so discharged. *Pollack v. AT&T*, 794 F.2d 860, 864-65 (3d Cir. 1986); *Pizzuto v. Perdue, Inc.*, 623 F. Supp. 1167, 1171 (D. Del. 1985). Once the *prima facie* case has been presented, the burden of production shifts to the employer to articulate some non-discriminatory reason for the termination. *McDonnell Douglas v. Green*, *supra*; *Lewis v. University of Pittsburgh*, 725 F.2d 919, 914 (3d Cir. 1984), *cert. denied*, 469 U.S. 892 (1984); *Worthy v. United States Steel Corp.*, 616 F.2d 698, 701 (3d Cir. 1980). Thereafter, once such a facially neutral legitimate business reason has been articulated by the employer for its decision, the production burden shifts back to the employee who must then bear the burden of demonstrating that the business reason given by the employer, was, in fact, a mere pretext to obscure racially discriminatory animus and actions. The evidentiary burden of proof on the plaintiff is the "preponderance of the evidence" standard.

This Court has emphasized that the plaintiff must prove that the defendant employer intentionally discriminated against him. In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981) this Court reiterated that: "... the ultimate burden of persuading the

trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff . . ." (at 253).

The *McDonnell Douglas* test and *Texas Department of Community Affairs* evidentiary standard has been articulated and applied by the Third Circuit Court of Appeals to require a "but for" showing: a plaintiff cannot prevail in a claim of racial discrimination in employment under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(e) and 42 U.S.C. § 1981 unless he can prove by a preponderance of the evidence that his race was the determinative factor in the decision to discharge him and "but for" his race, he would have been retained in employment. *Lewis v. University of Pittsburgh*, 725 F.2d 919, 914 (3d Cir. 1984), *cert. denied*, 469 U.S. 892 (1984).

The District Court correctly applied this settled law to the facts, and concluded that Appellant Riley failed to meet his evidentiary burden to prove that "but for" his race, he would not have been discharged. As the District Court correctly reasoned: "Once the defendant has articulated a legitimate, non-discriminatory reason for its action, the plaintiff must prove by a preponderance of the evidence that the defendant's reason is merely pretextual and that the defendant 'intentionally, discriminated against the plaintiff' *Be-lissimo v. Westinghouse Electric Corp.*, 764 F.2d 175, 180 (3d Cir. 1981." (J.A. 9).

In this case, Malcolm Riley demonstrated he was Black, he held the position of sorter at UPS for a brief period of time, he was discharged, and others were not. UPS articulated the business basis for its discharge decision: the cumulative poor work record amassed by Riley in a relatively brief period of employment. There the evidence stopped. Riley failed to present any credible evidence that discharging him for his poor record was a pretext, or any proof that racial

discrimination caused his discharge because whites with records as bad as his were not discharged.

The District Court concluded and the Third Circuit Court of Appeals affirmed, that Riley's evidence was sufficient only to establish a minimal "bare bones" *prima facie* case of racial discrimination based on the testimony of Mark Caine, that he was white and was not discharged. However, the District Court observed that while Caine may have committed disciplinary offenses, they were not comparable to plaintiffs: "Caine's offenses appear to be less in number and severity." (J.A. 9; Conclusion of Law No. 2).

While the District Court concluded Riley had made out a minimal *prima facie* case, Riley failed to go forward with evidence sufficient to rebut UPS's business reason for the termination and prove pretext. In *Lewis v. University of Pittsburgh*, the Third Circuit Court of Appeals emphasized that nothing in *McDonnell Douglas* "in any way relieve(s) the employee of his basic burden of proof." And this burden of proof and "but for" causation is required both under Title VII and § 1981. "We are satisfied . . . that Title VII and sections 1981 and 1983 all require a showing of 'but for' causation in an employment discrimination suit." *Lewis v. Univ. of Pittsburgh*, *supra* (at 914). Riley presented no such evidence.

Last term, the United States Supreme Court again revisited the framework for proof in disparate treatment employment cases and reaffirmed its prior holdings. In *Patterson v. McLean Credit Union*, No. 87-107 ____ U.S. ____, 57 L.W. 4705, 4710 (June 15, 1989) this Court observed:

"We have developed, in analogous areas of civil rights law, a carefully designed framework of proof to determine, in the context of disparate treatment, the ultimate issue of whether the defendant intentionally discriminated against the plaintiff. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell*

Douglas Corp. v. Green, 411 U.S. 792 (1973) . . . this scheme of proof, structured as a 'sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical issue of discrimination,' *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) should apply to claims of racial discrimination under § 1981."

In reviewing the plaintiff's evidence in *Patterson* this Court emphasized that there is no single way to prove intentional discrimination; the petitioner is free to present a variety of different forms of evidence which may demonstrate the employer's reasons for its actions are pretextual. *Patterson v. McLean Credit Union*, *supra*, at 4711. Yet, even measured by this broad evidentiary standard, here, Petitioner Riley simply failed to present any credible, relevant evidence of pretext. The appropriate legal precedents were correctly applied by the Courts below, and the evidentiary conclusion was inescapable: Petitioner Riley failed to present any facts to demonstrate UPS's business reasons for discharging him were mere pretext, or that whites were treated better than he was.

In fact, in this case, Riley simply failed to present any plausible evidence that he was treated differently from similarly situated employees who were non minorities. Where plaintiff fails to show how a similarly situated non-minority was treated, plaintiff cannot prevail. *Bellissimo v. Westinghouse Corp.*, 764 F.2d 175 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1244 (1986); *Molthan v. Temple University*, 778 F.2d 955 (3d Cir. 1985); *Bluebeard's Castle Hotel v. Government of Virgin Islands*, 768 F.2d 168 (3d Cir. 1986).

The District Court applied the correct evidentiary standard and concluded that UPS articulated legitimate non-discriminatory reasons for Riley's discharge due to his "long history of disciplinary violations." (J.A. 9; Conclusion of Law No. 3). By contrast, Riley failed to present evidence that

white employees were treated more favorably (J.A. 10; Conclusion of Law No. 4), and failed to present evidence to prove UPS's articulated reasons for discharge were pretextual. (J.A. 10; Conclusion of Law No. 5).

II.

The Evidence Presented at Trial Clearly Demonstrated That UPS Discharged Riley Solely on the Basis of His Abysmal Work Record.

UPS's "articulated reason" for discharging Riley was his poor work record, and Riley failed to show this business reason was "pretextual." As the District Court properly concluded:

"The evidence presented at trial clearly demonstrated that UPS discharged Riley solely on the basis of his abysmal work record and that the plaintiff's race was never a cause or factor in the defendant's decision to terminate Riley. The Court concludes that the evidence at trial clearly demonstrated that it was Riley's conduct and not his race that led to his many warnings and eventual discharge." (J.A. 10; Conclusion of Law No. 5).

It is undisputed that Malcolm Riley was a relatively short-term employee with UPS who gained a full-time employee position in April 1981, and was discharged only a year later after amassing a staggering number of disciplinary write-ups, formal written warnings, center level hearings and suspensions, which culminated in his discharge for "... continual failure to follow instructions, company methods and procedures, and overall work record." (Ex. D-1).

Riley's overall work record demonstrated he had a continuing problem with lateness and attendance; he repeatedly failed to show up on time for scheduled shifts and often failed

to call and inform UPS he would be late or unable to come in until after his shift started.

The evidence showed that Riley's job was to sort packages—something UPS has been doing capably for years. Yet, Riley seemed to delight in refusing to sort packages the way his employer wanted it done. He would sort to the wrong direction, missort, attempt to slow down the speed of work, and even on occasion was caught throwing packages. His attitude toward his work and many of his supervisors was uncooperative and insubordinate. He seemed to violate even the simplest rule—for example, smoking in work areas where smoking was prohibited.

Riley was written up for these problems by eight different supervisors on forty-eight separate occasions but such patient, progressive discipline failed to correct his poor performance. Riley did not seriously dispute his voluminous disciplinary history, but at trial portrayed himself as a man who was being picked on. By contrast, virtually every supervisor testified they disciplined all employees uniformly whenever they observed them missorting packages, throwing parcels, smoking where prohibited, or abusing the lateness and absenteeism policy. Progressive discipline was applied to blacks and whites alike. During a three-day bench trial, Riley was not able to produce any facts to show that these reasons for discharge set forth by UPS were pretextual.

III.

There Was No Evidence of Disparate Treatment and the Courts Below Properly Concluded That Plaintiff's Race Was Never a Cause or Factor in His Discharge.

In the factual context of this case, Riley could not prevail unless he proved by a preponderance of the evidence that there was a white UPS employee who amassed as poor a work

record as his in the same short employment span, and the white employee was not discharged because he was white. There is no such evidence.

No direct evidence of overt racial harassment or discrimination against plaintiff was presented, and the District Court properly concluded that the personnel records of two white employees that Riley introduced were totally dissimilar.

Plaintiff's only other evidence was the testimony of a former white co-worker, Mark Caine. Yet, the records and work histories of Caine and Riley were not comparable. They worked at different periods; there was no showing they had similar supervisors; they performed different jobs; they had different lengths of tenure; Caine had a cleaner record than Riley's during his probationary, pre-seniority period; and Caine had received far fewer disciplines than Riley. Most significantly, to the extent there was dissimilar treatment between employees in general, or between Caine and Riley, Caine himself repeatedly testified the differences were not based on race.

The testimony of Caine and the comparison of his record to Riley's clearly demonstrates Riley's record was far worse. Thus, this case is analogous to the fact situation reviewed by the Third Circuit Court of Appeals in *Bluebeard's Castle Hotel*, *supra* at 172-3. The Court reversed a finding in favor of a white employee who had been discharged for abusive behavior on the grounds the plaintiff had not produced any evidence that similar abusive misconduct by a black employee would have been dealt with more leniently. To show that the employer's business justification for discharge is a pretext, the white employee with the bad conduct would have had to show that a black employee who had the same misconduct was not terminated.

In *McDonnell Douglas*, *supra* 411 U.S. at 804, this Court observed, that to prove pretext and racial discriminatory treatment against a minority, it is relevant to show that

employees outside the protected minority group who were "involved in acts against [the employer] of comparable seriousness . . . were nevertheless retained or rehired." Here, Riley produced no evidence of any white employees who had work histories of "comparable seriousness" and had been retained. To the contrary, UPS managers uniformly testified they knew of no white employee who had been allowed to continue UPS employment with a record as bad as Riley's. (J.A. 186; Tr. 161A).

Moreover, the mere inference of disparate treatment raised by Caine's testimony is insufficient to overcome UPS's direct evidence that there was no racial discrimination in Riley's disciplinary history. In *Blue Beard's Castle Hotel*, the Third Circuit Court of Appeals took special note of the distinction between inferences of discrimination and the requisite direct evidence of discriminatory intent: ". . . in determining whether there is substantial evidence to support a finding of pretextual discharge, it is helpful to keep in mind that evidence of disparate treatment is used to infer intentional discrimination by the employer—it is not, however, direct evidence of such intent." at 172.

In this case, there was ample direct testimony from UPS supervisors that race was not a factor in disciplinary decisions. Even plaintiff's own witness, Mark Caine, candidly admitted that race was not the reason some employees were disciplined more harshly than others or supervisors "rode" some harder than others. (Tr. 136A-137A). Thus, rather than present direct evidence of racially discriminatory intent, plaintiff's own witness testified to no racial intent whatsoever.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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